

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of  
Petition of Social UPS, LLC, Virtual  
Lending Source, LLC and  
Telnform, LLC

CG Docket No. 02-278  
CG Docket No. 05-338

**PETITION OF SOCIAL UPS, LLC, VIRTUAL LENDING SOURCE, LLC  
AND TELNFORM, LLC FOR RETROACTIVE WAIVER**

Pursuant to Section 1.3 of the Federal Communications Commission's ("Commission") rules,<sup>1</sup> Social UPS, LLC, Virtual Lending Source, LLC and Telnform, LLC ("Petitioners") respectfully request that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) (the "Regulation") with respect to faxes that have been transmitted by Petitioners (or on their behalf) with the prior express consent or permission of the recipients or their agents ("Solicited Faxes") after the effective date of the Regulation.

**I. FACTUAL BACKGROUND.**

Telnform, LLC is a Delaware limited liability company and began business in 2002. Its business purpose was to provide advertising services, primarily to motor vehicle dealers. After doing some solicitations by fax it was decided to use a separate affiliated entity that would in part solicit by fax business from motor vehicle dealers. That entity, Virtual Lending Source, LLC was formed in 2000 as a Nevada limited liability company. Later, Social UPS, LLC was formed in 2010 as a Nevada limited liability company to manage social media websites of motor vehicle dealers. Petitioners confirmed with the applicable motor vehicle dealers solicited that it expressly consented to receiving

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<sup>1</sup> 47 C.F.R. Section 1.3

facsimiles.

Petitioners are facing a putative class action lawsuit seeking potentially multi-millions of dollars in damages because **they allegedly sent faxes to motor vehicle dealers who had not consented to receiving them**. The basis for certain of the claims in the lawsuit is the Telephone Consumer Protection Act ("TCPA").

On October 30, 2014, the Commission released FCC Order 14-164 (the "Fax Order").<sup>2</sup> Prior to the Fax Order's release, various petitioners had challenged the Commission's authority to issue the Regulation and alternatively sought retroactive waivers of its opt-out notice requirement for Solicited Faxes. In response to the admitted uncertainty about whether the opt-out notice applied to Solicited Faxes, the Commission granted retroactive waivers to certain fax advertisement senders to provide temporary relief from any past obligation to provide opt-out notices. The waivers granted in the Fax Order applied to the identified parties, and the Commission made clear that other, similarly-situated entities, like Petitioners, may also seek such waivers.

Specifically, there is no public interest in strict enforcement of the Regulation against **businesses who were confused by the Regulation and therefore did not include appropriate opt-out notices to fax recipients who had provided "prior express invitation or permission" to be sent faxes**. In contrast, the public interest would be harmed by **requiring parties, like Petitioners, to divert substantial capital and human resources from its economically productive activities to engage in unnecessary (and possibly ruinous) litigation because of past confusion over the Commission's regulations**. A waiver is thus appropriate here.

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<sup>2</sup> See *Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel October 30, 2014).



## **II. THE CURRENT STATUTORY AND REGULATORY FRAMEWORK.**

The TCPA, as codified in 47 U.S.C. § 227 *et seq.*, and amended by the Junk Fax Prevention Act of 2005 ("JFPA"),<sup>3</sup> prohibits, under certain circumstances, the use of a fax machine to send an "unsolicited advertisement."<sup>4</sup> An "unsolicited advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."<sup>5</sup>

As relevant to this Petition, the Regulation states a fax advertisement "sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice."<sup>6</sup> In addition to the Regulation, the Commission also adopted rules implementing the JFPA.<sup>7</sup> As explained in the Fax Order, a footnote in the Junk Fax Order led to industry-wide confusion regarding the Commission's intent to apply the opt-out notice to Solicited Faxes.<sup>8</sup> The Commission clarified this important issue in the Fax Order.

Pursuant to the Fax Order, the Commission "confirm[ed] that senders of fax ads must include certain information on the fax that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders."<sup>9</sup> Due to the aforementioned confusion,<sup>10</sup>

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<sup>3</sup> See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); *see also* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The TCPA and the JFPA are codified at 47 U.S.C. § 227 *et seq.*

<sup>4</sup> 47 U.S.C. §§ 227(a)(5) and (b)(1)(C).

<sup>5</sup> *Id.* § 227(a)(5).

<sup>6</sup> See 47 C.F.R. § 64.1200(a)(4)(iv); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration*, 21 FCC Rcd at 3812, para. 48 (2006) (the "Junk Fax Order").

<sup>7</sup> *See generally* Junk Fax Order.

<sup>8</sup> *See* Junk Fax Order, 21 FCC Rcd at 3818, para. 42 n.154 ("We note that the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.") (emphasis added).

<sup>9</sup> *See* Fax Order, para. 1.

<sup>10</sup> The Commission detailed the reasons for such uncertainty in the Fax Order: "Specifically, there are two grounds that we find led to confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient), the combination of which present us with special circumstances warranting deviation from the adopted rule. The record indicates that inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the

however, the Commission decided to grant retroactive waivers to parties affected by the confusion. Affected parties are those, like Petitioners, who have sent fax ads with the recipient's prior express permission and may reasonably have been uncertain about opt-out notice requirements for such fax ads. As explained by the Commission:

[W]e recognize that some parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether our requirement for opt-out notices applied to them. As such, we grant retroactive waivers of our opt-out requirement to certain fax advertisement senders to provide these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules.

[W]e believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule.

The Commission stated that other affected parties similarly situated as the petitioners, like Petitioners, have six months from the release of the Fax Order (October 30, 2014) to seek a waiver.<sup>11</sup> Petitioners' Petition is thus timely.

### III. DISCUSSION.

#### A. Petitioners Have Been Sued For Allegedly Violating the TCPA.

Petitioners were sued based on alleged violations of the TCPA's fax provisions. The pending class action lawsuit against Petitioners is *Autobahn Specialists, Inc. v. Social UPS*,

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applicability of this requirement to faxes sent to those recipients who provided prior express permission. Specifically, the footnote stated that 'the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.' The use of the word 'unsolicited' in this one instance may have caused some parties to misconstrue the Commission's intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient. We note that all petitioners make reference to the confusing footnote language in the record. Further, some commenters question whether the Commission provided adequate notice of its intent to adopt [the Regulation]. Although we find the notice adequate to satisfy the requirements of the Administrative Procedure Act, we acknowledge that the notice provided did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient." See Fax Order, para. 24-25 (internal footnotes omitted).

<sup>11</sup> See Fax Order, para. 30.



*LLC, et al*, Cause No. 6:11-CV-03196-BCW (U.S. District Court, Western District of Missouri (the "Missouri Lawsuit"). The plaintiff in the Missouri Lawsuit was sent a fax by mistake due to the similarity in its name to another motor vehicle dealer who had consented to receipt of facsimiles. As far as Petitioners know, all other persons or entities who received faxes from Petitioners gave their consent. Petitioners anticipate that the plaintiff in the Missouri Lawsuit will amend its complaint to include those dealers who consented but did not receive a proper opt out notice.<sup>12</sup>

**B. The Commission Should Grant a Limited Retroactive Waiver of Section 64.1200(a)(4)(iv) for Any Solicited Fax Sent by Petitioners or on Their Behalf.**

Petitioners respectfully request that the Commission grant a limited retroactive waiver of the Regulation for any Solicited Faxes sent by Petitioners (or on their behalf) after the effective date of the Regulation. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause is shown.<sup>13</sup> Generally, the Commission may grant a waiver of its rules in a particular case if the waiver would not undermine the policy objective of the pertinent rule and would otherwise serve the public interest.<sup>14</sup>

Further, waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.<sup>15</sup> As shown, both rationales apply.

**C. Waiver Would Not Undermine the TCPA's Policy Objective.**

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<sup>12</sup> It is not necessary for the Commission to consider the Missouri Lawsuit in acting on this Petition, and the dispute does not impact the sole issue raised in this Petition. Indeed, the Commission expressly noted that granting waiver should not "be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action." *See* Fax Order, para. 31. The two issues—whether waiver should be granted and whether waiver applies to any particular fax—are distinct.

<sup>13</sup> 47 C.F.R. § 1.3; *see also* 47 C.F.R. § 1.925(b)(3)(xi)-(ii).

<sup>14</sup> *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>15</sup> *See Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

Granting waiver to Petitioners would not undermine the policy objective of the TCPA,

which is "to allow consumers to stop unwanted faxes."<sup>16</sup>

More broadly, unlike indiscriminate "fax blasters" to the general consumer public, Petitioners did not send faxes to consumers but rather only to a limited select group of recipients: motor vehicle dealers. Accordingly, in Petitioners' situation, where its fax recipients *wanted* faxes, a waiver manifestly would not undermine a policy objective to stop *unwanted* faxes.

**D. Special Circumstances Suggest Deviation is Appropriate.**

As the Commission has explained, special circumstances counsel in favor of deviation from the general rule—rather than strict adherence. As detailed in the Fax Order, there was industry-wide confusion as to whether Solicited Faxes must include an opt-out notice based, in part, on the special circumstance of a confusing footnote in the Junk Fax Order. Petitioners, like many other companies, were reasonably confused as to whether Solicited Faxes must include an opt-out notice. Moreover, in Petitioners' situation, waiver strongly is in the public interest because denial of waiver could subject Petitioners to potentially crushing money damages—the bulk of which would go to plaintiffs' lawyers—rather than further the TCPA's policy objective. Indeed, the Commission made clear that the public interest favors not subjecting businesses that understandably were confused by the Regulation and inadvertently (and allegedly) acted outside of it, like Petitioners, to potentially ruinous damages:

The record in this proceeding demonstrates that a failure to comply with the rule—which as noted above could be the result of reasonable confusion or misplaced confidence—could subject parties to potentially substantial damages . . . This confusion or misplaced confidence, in turn, left some businesses potentially subject to significant damage awards under the TCPA's private right

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<sup>16</sup> Junk Fax Order, para. 48.




of action or possible Commission enforcement. We acknowledge that there is an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads. On balance, however, we find it serves the public interest in this instance to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward) <sup>17</sup>

In sum, Petitioners sent faxes to motor vehicle dealers with prior express permission and/or consent and was reasonably uncertain about whether opt-out notices were required on such fax ads. Therefore, Petitioners are similarly situated vis-à-vis the petitioners identified in the Fax Order and equally entitled to a limited retroactive waiver. Such waiver would not undermine the TCPA policy objective to prevent unwanted faxes because the faxes sent by Petitioners were wanted by the recipients. Finally, Petitioners submits that the public interest would be better served by the FCC's granting waiver rather than exposing Petitioners to potential catastrophic money damages that would serve mainly to enrich plaintiffs' lawyers.

#### IV. CONCLUSION.

For the reasons stated above, Petitioners respectfully request that the Commission grant Petitioners a limited retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by Petitioners (or on its behalf) after the effective date of the Regulation.

  
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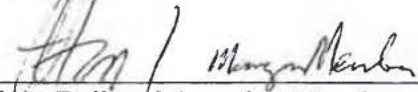
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<sup>17</sup> Fax Order, para. 27.

Declaration of Social UPS, LLC Officer

I have read the foregoing Petition and I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief, formed after reasonable inquiry.


Executed this 7<sup>th</sup> day of January, 2015.

  
Robert Bailey, Managing Member

Declaration of Virtual Lending Source, LLC Officer

I have read the foregoing Petition and I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief, formed after reasonable inquiry.

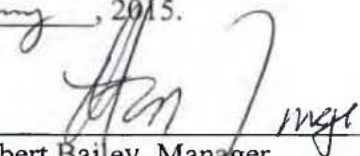
Executed this 7<sup>th</sup> day of January, 2015.

  
Robert Bailey, Executive Vice President

Declaration of Telnform, LLC Officer

I have read the foregoing Petition and I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief, formed after reasonable inquiry.

Executed this 7<sup>th</sup> day of January, 2015.

  
Robert Bailey, Manager